

***United States Court of Appeals
for the
District of Columbia Circuit***



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BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,162

UNITED STATES OF AMERICA,

Appellee,

v.

GLENN W. LUCAS,

Appellant.

On Appeal from a Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 29 1969

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August 29, 1969

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STATEMENT OF THE ISSUES

- I. Whether failure to continue the preliminary hearing pending arrival of appellant's retained counsel violated the 6th Amendment to the Constitution and Rule 5(b) of the Federal Rules of Criminal Procedure.
- II. Whether the refusal to allow court-appointed counsel to call the complaining witness who was sitting in the courtroom at the preliminary hearing violated Rule 5(c) of the Federal Rules of Criminal Procedure and was prejudicial to appellant's case.
- III. Whether impeachment use at trial of appellant's prior convictions upon pleas of guilty to unauthorized use of a motor vehicle and petit larceny was an abuse of discretion in violation of 14 D.C. Code §305 (1961).
- IV. Whether appellant's conviction of second degree burglary and grand larceny was consistent with the evidence where the evidence showed those crimes were committed by a person having keys to the premises and the jury found appellant not guilty of the theft of those keys.

The pending case has not previously been before this Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,162

UNITED STATES OF AMERICA,

Appellee,

v.

GLENN W. LUCAS,

Appellant

On Appeal from a Judgment of the United States
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BRIEF FOR APPELLANT

References To Rulings

Appellant was tried in the United States District Court for the District of Columbia on a four count indictment, and on March 20, 1969 convicted on counts 3 and 4, of second degree burglary (D.C. Code Section 22-1801 (b)) and grand larceny (D. C. Code Section 22-2201). The jury found Mr. Lucas not guilty of the robbery of, or assault with a dangerous weapon on, Mr. Benjamin Scott (D.C. Code Sections 22-2901, 22-502). By judgment dated April 11, 1969, Mr. Lucas was sentenced to imprisonment for a period of three to ten years. On April 21, 1969, the District Court granted his application for leave to appeal in forma pauperis. This Court has jurisdiction under 28 U.S.C. Section 1291 and 1294(1).

STATEMENT OF THE CASE

A. The Preliminary Hearing

The nature of the case, the course of proceedings and its disposition in the court below are indicated in the immediately preceding section.

On October 12, 1968, Glenn W. Lucas was arrested upon a warrant sworn out by his co-worker, Mr. Scott, charging him with burglary II and grand larceny of the Burger Chef Restaurant,^{1/} 1226 E Street, N.E.

A preliminary hearing was held on October 16, 1968, before Judge Tim C. Murphy. At the commencement of that hearing the court asked Mr. Lucas whether he had an attorney, and Mr. Lucas responded, "James A. Willey" (Preliminary Hearing TR 2). Mr. Willey was not in the courtroom at that time. Mr. Lucas assured the court when questioned of counsel's absence that his retained counsel had promised to attend the preliminary hearing. Without further ado the court decided that it was "not going to delay the preliminary hearing," appointed a legal aid lawyer to represent Mr. Lucas, and proceeded. (Preliminary Hearing TR 3-4).

The Government's sole witness was Officer Richard J. Barrett. Officer Barrett was not a witness to the alleged crimes. His testimony was based upon statements made to him by Messrs. Scott and Redman, both fellow employees of Mr. Lucas, at the Burger Chef Restaurant.

^{1/} The Burger Chef was referred to as the "Burger Chief" throughout the preliminary hearing.

Mr. Scott, at approximately 5:00 A.M. on the morning of October 11, 1968, summoned the police by pulling a fire alarm and told Officer Barrett that the keys to the Burger Chef (which had been entrusted to him as night manager) had been taken by Mr. Lucas. Only much later, after the burglary was discovered, did Mr. Scott add that Mr. Lucas had "put a razor to his neck" to obtain the keys (Preliminary Hearing TR 11). On Mr. Scott's complaint Officer Barrett accompanied by Mr. Scott, sought Mr. Lucas; discovered him and a companion in the vicinity of the Burger Chef, and searched the two. Neither had the keys (Preliminary Hearing TR 5-6).

On cross-examination Officer Barrett testified that Mr. Scott had been drinking at the time he summoned the police and in that condition (after the search of Mr. Lucas) was let out of the patrol car, three or four blocks from the Burger Chef just prior to the burglary (Preliminary Hearing TR 9-10).

Shortly after the release of Messrs. Scott, Lucas and his companion, at approximately 6:00 a.m. that morning, Officer Barrett responded to a burglar alarm at the Burger Chef. The doors to the restaurant were locked. There was no visible sign of forcible entry. The police waited for Mr. Ramsey, the assistant day manager, to open the restaurant door, at which point the burglary was discovered (Preliminary Hearing, TR 6, 9).

Officer Barrett further testified that the day manager, Mr. Redman, told him that Mr. Lucas had, at approximately 6:15 a.m. that day, come to Mr. Redman's house and asked for a bag in which to place some money (Preliminary Hearing, TR 8).

Mr. Lucas' court-appointed attorney sought to call Mr. Scott, who together with Mr. Redman, had been identified by Officer Barrett as sitting in the courtroom. The court inquired whether testimony favorable to Mr. Lucas would be

produced, and when court-appointed counsel could not so advise, the court refused to permit the witness to be called (Preliminary Hearing TR 10-12). Probable cause was found, and Mr. Lucas ordered held under bond previously set to await the action of the grand jury, which handed up its four-count indictment on November 25, 1968.

Mr. James A. Willey, who Mr. Lucas testified he had retained, was formally appointed by Judge Sirica on November 19, 1968.

B. The Trial

At the outset of the trial, recognizing that Mr. Lucas would be forced to testify in his own behalf in order to explain fully the events of October 11th, defense counsel sought to exclude impeachment use of Mr. Lucas' prior convictions. These were two and recent; pleas of guilty to unauthorized use of a motor vehicle and (arising out of the same incident) petty larceny.

After ascertaining that the defense planned to call a corroborating witness, the Court denied the motion ruling that both guilty pleas "go to the question of the honesty or dishonesty of the defendant . . . which I think under Luck are permissible." (TR 3-4).

The Government then presented its case through five witnesses -- Messrs. Scott and Redman who appointed counsel had not been allowed to call at the preliminary hearing; Officer Barrett and his patrol mate Officer Cochran, and Mr. Charuhas, part owner of the Burger Chef.

The burglary of the Burger Chef was an inside job. There was no breaking or forcing of the door. The burglar alarm had apparently been set off when the burglar, leaving through the back door, neglected to turn a lock on the inside of the office which controlled the back door alarm. (TR 69-70, 111-114). Only

four persons had keys to the Burger Chef -- Messrs. Redman, Scott, Charuhas and Ramsey, the last, another employee of the restaurant (TR 43-44).

Mr. Scott testified that after locking the Burger Chef at 1:00 a.m. he and Lucas went out drinking; first, to the Hip and Sip for a few beers, then on to an after hours place where Mr. Scott purchased two half-pints of Scotch, and at which he and Lucas stayed until 4:00 or 4:30 a.m. (TR 13-16, 32).

The next 20 minutes to half an hour, Mr. Scott testified, were occupied by a desultory walk; at which point shortly before 5:00 a.m. Mr. Lucas forced Mr. Scott "to walk back up the street about 4 or 5 doors and onto a porch," pushed him into a chair while calling a friend from the house, and after his friend appeared Mr. Lucas "twisted my arm behind my back and also put a box-opening razor to my neck," taking the keys to the Burger Chef (TR 17-18, 36).

Mr. Scott summoned the police but told them only "that one of the boys took the keys from my pocket and he was headed toward the Burger Chef" (TR 20).

The police, with Mr. Scott, went in pursuit, discovered Mr. Lucas and his companion in the vicinity of the Burger Chef, searched the two in the presence of Mr. Scott, discovered a box-razor on Mr. Lucas' companion (who had just come off work, and used the box-razor in his job as a stockroom boy to open packages), and released all concerned letting Mr. Scott out of the patrol car at approximately 5:30 a.m. after admonishing him to call his employer (TR 19-22, 39, 67-68). Instead, Mr. Scott returned to the Burger Chef without attempting to call the manager and sat on the stoop of a neighboring store until 5:30 a.m.; then caught a bus to his father's house (TR 40, 42).

Officer Barrett's testimony was in conflict with Mr. Scott's in certain critical respects. He testified that after responding to the fire alarm, Scott

told him that two Negro males had "approached" him taking the keys to the Burger Chef (TR 63). Scott made no mention of a razor or being dragged onto a porch (TR 63, 67). He confirmed that Mr. Scott had been drinking and confirmed the search of Mr. Lucas and his companion. Mr. Scott was not searched (TR 72, 76). Mr. Scott was let out of the patrol car between 5:30 and 5:40 a.m. in the vicinity of the Burger Chef, and the officer responded to the burglar alarm ringing at 6:00 a.m. (TR 76).

Officer Cochran supported Officer Barrett's testimony and added that he did not arrest either Lucas or his companion for theft of the keys because "there was doubt in my mind" whether such a robbery had taken place (TR 92).

Mr. Redman's testimony differed somewhat from the version Officer Barrett had presented at the preliminary hearing. Mr. Redman testified that at about 6:00 a.m., Mr. Lucas and a companion arrived at his house; that the companion had under his shirt rolls of coins and loose change, and that Lucas asked Redman for a bag in which to put the coins, telling Redman that he had gotten the money from "around the corner" (TR 96-97, 101). The Burger Chef, a Safeways, and a cleaners are the only stores Mr. Redman remembered near his house (TR 101). He then immediately called Mr. Charuhas at 6:15 a.m. to relate his conversation with Lucas, and Mr. Charuhas testified regarding that call (TR 100, 114).

Mr. Lucas was the sole defense witness. Prior to Mr. Lucas' taking the stand, Mr. Humphries, his supporting witness, declined to testify (TR 152-53).

In far greater detail than Mr. Scott, Mr. Lucas related their drinking expedition including the brand of Scotch purchased, the name of the woman who came to their table at the after hours place, and the names of other persons who entered those premises (TR 157-161).

He also accounted for his movements from 4:30 until 5:00 with greater precision. During that time, according to Lucas, at Scott's direction, they stopped by at the house occupied by Scott's ex-wife. While in the yard of the house the man with whom she was living appeared at the window and ordered Scott to "get the hell on away" (TR 161). Scott didn't; the man again appeared at the window -- this time with a pistol -- and Scott and Lucas quickly departed. Scott then started to run, and apparently broke into an uncontrolled fit. Thinking Scott had had too much to drink, Lucas grabbed Scott's remaining half-pint of Scotch and broke it against the sidewalk. Lucas then sought a friend to assist Scott home. When Scott refused, Lucas and his companion left (TR 160-163).

Lucas then related the search and thinking that Scott was attempting to set him up for a burglary, decided to confer with his co-employee, Mr. Redman, to whose house he then walked together with his companion, Mr. Humphries (TR 163-165). Following a conversation with Mr. Redman, Mr. Lucas at approximately 6:00 A.M. went to another friend's house, and then home (TR 165, 185-187). Mr. Lucas denied committing any of the crimes charged in the indictment (TR 166-167).

ARGUMENT

- I. Reversal of the conviction is required and a remand necessary to determine whether appellant's Sixth Amendment right to counsel was violated by the failure to continue his preliminary hearing pending arrival of retained counsel.

With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript of the preliminary hearing (TR 3-4).

The Sixth Amendment to the Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense." That right to counsel is a constitutional right to be represented by counsel of one's choice. As this Court said in Lee v. United States, 96 U.S. App. D.C. 272, 235 F.2d 219, 221 (1956) when holding it error to appoint counsel rather than continue trial over the weekend to allow defendant to retain counsel of his choice:

It is a fundamental principle that an accused be permitted to choose his own counsel, the practice of assigning counsel being reserved for cases where the accused cannot or does not select his own. As we said in Smith v. United States, the accused's right to "the assistance of counsel * * * implies that he shall have an opportunity to select such counsel, and * * * in the event of his failure so to do, counsel shall be assigned by the court * * *" (emphasis in original).

Once the accused ceases to become a mere suspect and formal proceedings (such as a preliminary hearing) are instituted against him "the right to the assistance of counsel whom the accused has himself retained is absolute. . . ."

Spano v. New York, 360 U.S. 315, 327 (1959) (Concurring Opinion of Justices Stewart, Douglas and Brennan).

The precise relief sought here was ordered by the Supreme Court in Reynolds v. Cochran, 365 U.S. 525 (1961) where a state court judge denied continuance of a multiple offender hearing pending arrival of retained counsel. The Supreme Court thought (Id. at 530)

it clear that this case must be reversed for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to . . . [his] constitutional claim . . . that he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained in the proceeding against him.

Quoting Powell v. Alabama, 267 U.S. 45, 69 (1932), the Supreme Court in Reynolds v. Cochran continued (at 530-31):

"If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

See also, Chandler v. Fretag, 340 U.S. 3, 9 (1954).

Mr. Lucas' Sixth Amendment rights having been violated, a fortiori his Fed. R. Crim. Pro. 5(b) right to be heard through retained counsel has been violated.

Where error of such magnitude is committed we do not understand ourselves obliged to prove that prejudice resulted.^{2/} Such an argument was advanced by the Government in Reynolds and rejected (at 531):

^{2/} The failure to allow an accused to be represented by his retained counsel is significantly different from the failure to appoint counsel at a preliminary hearing. Appointment of counsel at a preliminary hearing has not yet been held a constitutional necessity, Pointer v. Texas, 360 U.S. 400, 402 (1965) where the Court specifically reserved that question. Compare Nance v. United States

(contd.)

Even assuming, which we do not, that the deprivation to an accused of the assistance of counsel when that counsel has been privately employed could ever be termed "harmless error," it is clear that such deprivation was not harmless under the facts as presented in this case. (emphasis added)

It is only rarely, if ever, that a denial of any constitutional right can be termed harmless error, Chauman v. California, 386 U.S. 18, 42 (1967) (Mr. Justice Stewart concurring):

[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were "harmless." Illustrations of the principle are legion.

* * * *

When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 US 60, 76, 36 L ed 600, 702, 62 S Ct 457. That, indeed, was the whole point of Gideon v. Wainwright, 372 US 335, 9 L ed 2d 799, 63 S Ct 792, 93 ALR2d 733, overruling Betts v. Brady, 316 US 455, 36 L ed 1595, 62 S Ct 1252. Even before trial, when counsel has not been provided at a critical stage, "we do not stop to determine whether prejudice resulted." Hamilton v. Alabama, 360 US 52, 55, 7 L ed 2d 114, 117, 62 S Ct 157; White v. Maryland, 373 US 59, 60, 10 L ed 2d 193, 194, 63 S Ct 1050.

* * * *

2/ (contd.)

123 U.S. App. D.C. 209, 359 F.2d 273 (1966) (also reserving that question), McGill v. United States, 121 U.S. App. D.C. 179, 346 F.2d 791 (1965), Holmes v. United States, 125 U.S. App. D.C. 187, 370 F.2d 209 (1966) and Anderson v. United States, 122 U.S. App. D.C. 277, 352 F.2d 945 (1965) with Council v. Clemer, 65 U.S. App. D.C. 74, 177 F.2d 22, cert. denied 330 U.S. 600 (1949) (no constitutional right to appointed counsel at preliminary hearing) and Jackson v. United States, 119 U.S. App. D.C. 100, 337 F.2d 136, cert. denied 360 U.S. 935 (1964) (no constitutional right to appointed counsel at preliminary hearing). A showing of prejudice is of course required when the right involved has not been held to be of constitutional magnitude. See also, United States v. Plattner, 330 F.2d 271 (2d Cir. 1964) (right to present case through counsel of one's choice is a constitutional right; showing of prejudice not required.).

But assuming arguendo that it is necessary to show that the denial of an accused's right to retain counsel is prejudicial, then we take it the test of prejudice must be whether the prosecution can (Id. at 24) "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." That standard cannot be met here. The record below affirmatively demonstrates the prejudice to Mr. Lucas' case which flowed from the appointment of a legal aid counsel in lieu of allowing Mr. Willey to conduct the preliminary hearing. Since that prejudice involves denial of Mr. Lucas' Fed. R. Crim. Pro. 5(c) rights, and constitutes an independent ground for reversal, discussion of prejudice is treated infra in Point II.

- II. Refusal to allow court-appointed counsel to call the complaining witness who was sitting in the courtroom at the preliminary hearing violated Rule 5(c) of the Federal Rules of Criminal Procedure and was prejudicial to appellant's case.

With respect to Point II, appellant desires the Court to read in its entirety the reporter's twelve-page transcript of the preliminary hearing, and pages 17-18, 20, 40-42, 44-47, 76, 96-102, 159-63, 165, 185-186 of the reporter's transcript of the trial.

The prejudice in not continuing the preliminary hearing until Mr. Willey's arrival was twofold -- first, the inability of appointed counsel to convince the Commissioner that Rule 5(c) of the Federal Rules of Criminal Procedure gives the defense the unqualified right to compel eye-witness testimony -- especially when those witnesses are sitting in the courtroom; and, second, the inability of appointed counsel to assign any reason why the testimony of Mr. Scott would be helpful to the accused's cause.

A. Rule 5(c)

This Court has held that an accused has a Rule 5(c) right to compel attendance of "material witnesses reasonably requested" Washington v. Clemmer, 119 U.S. App. D.C. 216, 219, 339 F.2d 715, 718 and 119 U.S. App. D.C. 226, 339 F.2d 725 (1964). Considered material are eye-witnesses, Ross v. Sirica, 127 U.S. App. D.C. 10, 380 F.2d 557 (1967); cf., Greenwell v. United States, 115 U.S. App. D.C. 44, 317 F.2d 108 (1963) and "the complainant and other material witnesses named in the complaint who for some reason have not been called by the Government," Ross v. Sirica, supra; Washington v. Clemmer, supra.

Mr. Lucas then had a clear right to confront Messrs. Scott and Redman at the preliminary hearing, for they were respectively complainant and eye-witness. That right was not pressed (Preliminary Hearing TR 11-12):

MR. FAY: Your Honor, the defense would like to call Mr. Benjamin Scott.

THE COURT: Why?

MR. FAY: I would like to examine him as to what happened that morning.

THE COURT: Have you talked to him? Do you have any idea as to what he is going to say, that will assist you in your defense, or is this purely a fishing expedition?

MR. FAY: Your Honor, I spoke to him at the appearance on Saturday, I believe it was.

THE COURT: My point is, will he produce any testimony that will be favorable, or add to your defense, or are you merely trying to see what he is going to testify too, [sic] for the government, at a later time?

MR. FAY: Your Honor, I think that -- no, I don't believe his testimony will add to the defense.

THE COURT: It will not?

These are not miniature trials here, these are preliminary hearings. I have to have reasonable proof, or certainty by way of testimony. If every potential government witness can be called by the defense, merely to see what they are going to say, I don't blame you for making the record, but we have not yet reached that stage. I will not permit it.

Certainly, appointed counsel was not seeking to call "every potential Government witness". He was seeking to call the complainant which he had a Rule 5(c) right to do. And since the Commissioner retains wide discretion to control the type and time of questioning there is little danger of the proceeding being turned into a "miniature trial".

The danger involved in a preliminary hearing is not one of too much, but of too little. The accused's rights of discovery in criminal cases are woefully inadequate, and the subject of increasing those limited rights appears with regular frequency in the law reviews and in conferences among members of the bar and of the bench. See e.g., "Discovery in Criminal Cases", 44 F.R.D. 481. Discovery is not a weighty burden, to be avoided by the Government and the courts. It is an elementary right -- for the accused to confront his accusers -- and flows from the same Sixth Amendment values which constitutionally guarantee an accused "to be confronted with the witnesses against him".

These general considerations aside, the preliminary hearing presents an accused with one of his few existing opportunities for pre-trial discovery. It is not subverting the purpose of a preliminary hearing to recognize, as this Court has recognized, that that hearing has a purpose in addition to determination of probable cause. It affords the accused "an important right", namely, "a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the Government's case against him." Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894, cert. denied, 380 U.S. 944 (1965); accord, Ross v. Sirica, supra.

B. Prejudice

None of these considerations were pressed at the preliminary hearing. Appointed counsel's argument collapsed in mid-sentence -- "Your Honor, I think that -- no, I don't believe his testimony will add to the defense." It is undoubtedly true that appointed counsel with the burdens of a heavy caseload and a limited opportunity to explore with Mr. Lucas the events of October 11th did a workmanlike job under trying conditions. But this only heightens the prejudice which Mr. Lucas' case suffered from failure to continue the preliminary hearing until Mr. Willey arrived.

1. Mr. Scott

One more familiar with those events may well have been quick to recognize the inherently incredible nature of Mr. Scott's story as related by Officer Barrett. According to the Officer, Mr. Scott told him "that Mr. Lucas took his keys from him, and the keys belong to the Burger Chief [sic], where Mr. Scott and Mr. Lucas worked (Preliminary Hearing TR 5). Yet only "later" (i.e., hours after the burglary when Mr. Scott was interviewed by the police and swore out the complaint) did Mr. Scott report "that Mr. Lucas put a razor to his neck, and forced him to turn over the keys." (Preliminary Hearing TR 10-11). It certainly warrants explanation how Mr. Scott could have been so cool and clearheaded to neglect mentioning that a few minutes before the police arrived in response to his pulling a fire alarm at 5:00 a.m. a man had put his very life in danger by pressing a razor to his neck. In one's scale of values such a personal threat to life should have made more of an impression on Mr. Scott than the reported theft of keys to a hamburger joint. And since the police had not searched Mr. Scott for the missing keys, it may well have been interesting to learn if those keys were really missing; whether Mr. Scott's personal keys were also among those missing; and, if so, how he gained entry to his house at 6:00 a.m. that morning, and indeed how and when he journeyed from the scene of the crime shortly before the burglary, to home.

Mr. Scott was the Government's lead-off witness at trial. His testimony alone provided the sole basis for two of the four counts, and was the principal basis for the two counts upon which

Mr. Lucas was convicted. At trial his testimony occupies more pages of the transcript than that of any other witness including that of Mr. Lucas. It repeats the inherently unbelievable story regarding theft of the keys (compare TR 20 with TR 17-18), and is generally so sparse in every detail of his actions with the exception of the razor incident (see TR 44-47 and compare TR 17-18 with TR 159-163) that it is obviously the testimony of a man who was too drunk at the time to recollect events reliably.

At trial, for the first time, Mr. Scott testified that he took a bus at approximately 5:45 a.m. to his father's house — and again, for the first time, testified that at about that same time he called the police emergency number to warn them to keep a watch on the Burger Chef (TR 40-42). Had trial counsel through discovery at the preliminary hearing, been aware of this testimony, bus and telephone records could have been explored to verify these claims.

We are left with the abiding conviction that the failure to allow retained counsel to conduct the preliminary hearing was prejudicial to Mr. Lucas' case at trial. There is reason to believe that cross-examination of Mr. Scott would have been more pointed. It may be that had the question of drunkenness been explored at the preliminary hearing, Mr. Scott might have been considered incompetent to testify at trial. Or, the Government may not have sought to indict Mr. Lucas for assault with a dangerous weapon and theft of the keys. In that event there would be no factual basis for our suspicion that the jury reached an illegal compromise verdict (infra, Point IV). It can hardly be said with assurance that the

constitutional error in denying Mr. Lucas a continuance of his preliminary hearing until retained counsel appeared, did not beyond a reasonable doubt, play a part in his conviction on Counts 3 and 4. Chapman v. California, supra.

2. Mr. Redman

Appointed counsel understandably did not seek to call Mr. Redman to testify at the preliminary hearing. His attempts to call the complaining witness, Mr. Scott, had already been rebuffed, and hence there was no hope in pressing the point again. But what we have said earlier, supra II A, establishes that Mr. Lucas' Rule 5(c) rights were violated when appointed counsel reasonably concluded that he would be denied the right to call Mr. Redman.

Here again the result may well have been different had retained counsel been on hand. Our discussion of the questions unasked of Mr. Scott lead us to believe that his testimony would have so weakened the Government's case that Mr. Redman would (the strict requirements of Rule 5(c) aside) have been allowed to testify. And again, the outcome at trial may have been different.

There were critical discrepancies in Mr. Redman's testimony at trial from the story related by Officer Barrett. Beyond that there was an obvious need to pinpoint as closely as possible the timing of the morning's happenings, for here there was a significant divergence between the testimony at trial of Mr. Lucas and that of Mr. Redman's.

At the preliminary hearing, as related by Officer Barrett's hearsay testimony, Mr. Redman had told the Officer that Mr. Lucas at 6:15 or 6:20 a.m. came to his house with a bunch of money wrapped in packages and asked for a bag in which to place the money (Preliminary Hearing TR 7-8).

At trial Mr. Redman moved up Mr. Lucas' presence to 6:00 or 6:05 a.m., had him accompanied by a friend, and the money, in the possession of that person rather than Mr. Lucas. Moreover, at trial, Mr. Redman testified that Mr. Lucas admitted having gotten the money from "around the corner", where only two stores other than the Burger Chef are situated, all presumably locked for the evening (TR 96-102).

It is not unlikely that these discrepancies from Mr. Redman's story as recounted at the preliminary hearing -- discrepancies for which trial counsel was unprepared -- had a significant impact on the jury's deliberations.

Certainly, the time of the alleged crimes was critical. The burglar alarm at the Burger Chef had sounded at 6:00 a.m. and close questioning of Mr. Redman's awareness of the hour at the preliminary hearing could have placed Mr. Lucas' visit, as he himself testified, prior to the burglary (TR 76, 165, 185-86).

Secondly, cross-examination of Mr. Redman at trial was made considerably more difficult by the surprise testimony that Mr. Lucas had admitted having gotten the money in the possession of his companion from around the corner at a time when all stores were

presumably closed for the night. It is not unlikely, since Mr. Lucas admitted being at Mr. Redman's house earlier that morning, that at the preliminary hearing retained counsel would have questioned Mr. Redman concerning any conversations the two had that morning. Surely, belief in Mr. Redman's testimony at trial is again strained when its most damaging revelation was not even alluded to in Officer Barrett's recital at the preliminary hearing.

A conversation where the accused admits the crime (or comes exceedingly close to that) is not something which drops from memory five days after the event only to recur five months later. This Court has recognized that where the absence of counsel at a preliminary hearing seriously impedes defense counsel's cross-examination at trial, the trial has been unlawfully prejudiced. Dancy v. United States, 124 U.S. App. D.C. 58, 361 F.2d 75 (1965).

Again, the Chapman v. California standard of harmless error cannot be met.

III. Impeachment use at trial of appellant's prior convictions upon pleas of guilty to unauthorized use of a motor vehicle and petit larceny was an abuse of discretion in violation of 14 D.C. Code Section 305 (1961).

With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript of the trial (TR 3-4, 47-48, 104, 121, 128, 152-153, 166-169).

In the discussion of Point II we have explained that the conviction below hinged upon issues of credibility. The jury discredited Mr. Scott's story that the keys to the Burger Chef had been taken from him by Mr. Lucas at the point of a razor. Indeed, the jury in rendering a not guilty verdict on counts 1 and 2, must reasonably have doubted whether Mr. Lucas obtained the keys from Mr. Scott at all. The difficulty the case presented to the jury is also manifested by its deliberating from 3:20 P.M. on March 19th until it returned its verdict at 4:23 P.M. the following day. No witness other than Mr. Lucas himself, testified for the defense. In these circumstances anything which may have impaired Mr. Lucas' credibility could easily have led to his conviction on counts 3 and 4.

Beginning with Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) this Court has been especially diligent in insuring that jury verdicts are not tainted by prejudice arising from the introduction of prior convictions. As that doctrine was summarized in Jones v. United States, ____ U.S. App. D.C. ____, 402 F.2d 639, 642 (1968):

The Luck doctrine gives a trial judge, under 14 D.C. Code §305 (1961), discretion to rule, before a defendant takes the stand, whether his prior convictions can be introduced to impeach his credibility. The twin concerns behind the doctrine are that the cause of truth

may be "helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction," and that the "prejudicial effect of impeachment [may] far outweigh the probative relevance of the prior conviction to the issue of credibility." 121 U.S. App. D.C. at 156, 348 F.2d at 768.

That possibility of prejudice is so obviously apparent in all cases, but so elusive to discover in a particular case that this Court has suggested Stevens v. United States, 128 U.S. App. D.C. 221, 370 F.2d 485, 486 (1966):

Perhaps the evidence of a prior criminal record should be limited to a conviction which bears clearly on credibility -- perjury, for example.

The logic of the situation would seem to support that dictum for in every case in which a prior conviction is used to impeach the credibility of the defendant the only proper issue is whether or not the defendant is a truth-teller. Neither the manner of Mr. Lucas' prior convictions nor the crimes involved legitimately bear on his credibility at all.

A. Guilty Pleas

Mr. Lucas was convicted of unauthorized use of a motor vehicle and petit larceny upon pleading guilty to those charges. In Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936, 940 n. 8 (1967), cert.denied 390 U.S. 1029 (1968) this Court stated:

The relevance of prior convictions to credibility may well be different as between a case where the conviction of the accused was by admission of guilt by a plea and on the other hand a case where the accused affirmatively contested the charge and testified, for example, that he was not present and did not commit the acts charged. In the latter situation the accused affirmatively puts his own veracity in issue when he testifies so that the jury's verdict amounted to rejection of his testimony; the verdict is in a sense a de facto finding that the accused did not tell the truth when sworn to do so.

In the heat of trial the jury cannot be expected to keep in mind the distinction between a plea of guilty and conviction upon a jury verdict following a full dress trial. It would be unlikely if the jury recalled anything more than the fact and nature of the conviction.

Certainly in the present case that distinction was not even presented to the jury by the Government.^{3/} On cross-examination the prosecuting attorney asked whether appellant was (TR 167-168) "the same Glenn Lucas that was convicted in November of 1968 of unauthorized use of a motor vehicle and petty larceny" and Mr. Lucas responded, "Yes, sir. I am." Had defense counsel on redirect examination sought to dwell upon the distinction between a plea of guilty and a full-dress trial the likelihood is that the fact of Mr. Lucas' prior convictions would have been even more prejudicially revealed.

The practical impossibility of defense counsel seeking to impress upon the jury, through examination of the defendant, that a prior conviction by plea of guilty should be accorded no impeachable weight counsels for a per se rule of exclusion. If logic is to be the guide then a plea of guilty means no more than that the defendant having been advised of the nature of the charge against him, and aware of the evidence in support of that charge decided to tell the truth that he had indeed committed the alleged crime.

Yet that of course is not the inference the Government wishes the jury to draw, nor is it the inference the jury does draw, when a defendant is questioned regarding his prior guilty pleas. The fact revealed is that the defendant has

^{3/} Defense counsel had earlier raised the prior convictions in an attempt to lessen their prejudicial impact (TR 47-48) following the trial court's ruling that the Government could use them for impeachment.

been a law-breaker, and the inference drawn is that the defendant has again broken the law. This "bad man" inference is obviously improper, but there is no practical means of preventing it other than to establish what logic compels -- a per se rule of exclusion for convictions based upon guilty pleas.

B. Nature of The Crimes

The nature of Mr. Lucas' unauthorized use of a motor vehicle conviction also had no bearing upon the issue whether he was a truth-teller. This Court, in recently affirming a conviction where the trial court had excluded impeachment use of that crime, said United States v. Carr, ____ U.S. App. D.C. ____, ____ F. 2d ____, No. 22,373 (D.C. Cir. July 22, 1969):

Both Luck v. United States, 121 U.S. App. D.C. 151, 157, 348 F.2d 763, 769 (1965), and Gordon v. United States, 127 U.S. App. D.C. 343, 347, 383 F.2d 936, 940 (1967), cert. denied, 390 U.S. 1029 (1968), establish that the nature of the crime is important in considering whether or not a prior conviction may be used for impeachment. The court may be called upon to "weigh the probative value of the convictions as to the credibility against the degree of prejudice which the revelation of his past crimes would cause." Acts of "deceit, fraud, cheating, or stealing" have been considered as universally reflective of poor character and diminished honesty and integrity.

Under these guidelines the trial judge was clearly correct in permitting use of the larceny convictions for impeachment in this case, since this is a crime reflective of diminished honesty and integrity. The misdemeanor of taking property without right is not, however, to be equated with larceny or other charges of dishonest conduct properly related to credibility. This misdemeanor has been distinguished from larceny, in that "proof of a specific criminal intent to deprive an owner of his property permanently is absent." It has been held even not to be the act of a "thief" in certain criminal context. While "joyriding" is conduct that may not be tolerated lightly, it has elements bringing it within the category of "impulsive" crimes and should not be deemed the kind of larcenous act that is routinely considered to reflect on credibility and hence constitutes permissible impeachment. (footnotes omitted)

Nor should Mr. Lucas' petit larceny conviction been used for impeachment. Certainly there is no rule of law that the crime of petit larceny, without more, is proper for impeachment. Barber v. United States, 128 U.S. App. D.C. 193, 392 F.2d 517 (1968); Stevens v. United States, supra; Jones v. United States, U.S. App. D.C. , 404 F.2d 212, 216 (1968) (Wright, J. concurring).

In the present case, the circumstances point clearly to exclusion. First, the petit larceny conviction arose out of the same incident as Mr. Lucas' conviction for unauthorized use of a motor vehicle. As such, it was part and parcel of the same impulsive act and hence should have been excluded. Second, since Mr. Lucas was on trial for grand larceny, the introduction of a prior similar crime was highly prejudicial to his trial. As this Court said in Gordon v. United States, supra, at 127 U.S. App. D.C. 347, 383 F.2d, 940:

"A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity."

The crime of petit larceny does not have the direct relation to veracity required by Gordon; nor, where the conviction was obtained by means of a guilty plea and part of the same transaction as a joy-riding conviction, are there "strong reasons for disclosure."

C. The Luck Hearing

Finally, the record below indicates that the trial court did not bring its judgment to bear on all relevant considerations prior to the Government's use of Mr. Lucas' prior convictions. Though instructed by Gordon that pleas of guilty stand on a different footing from convictions after trial, the court ignored this fundamental distinction. Though instructed again by Gordon that introduction of similar crimes should be allowed only where there are strong reasons for disclosure, the court did not relate what compelling reasons for disclosure here existed. Similarly, the relative youth of Mr. Lucas (21 at time of trial) and the fact that the two convictions were based on a single incident were apparently not weighed.

The reasons given by the trial court for its ruling were twofold. First, that Mr. Lucas had a corroborating witness who the defense planned to call. Although this appeared to be true at the outset of trial, the corroborating witness declined to testify prior to Mr. Lucas' taking the stand. At that point, it was clear that the case for the defense was to be presented solely through the testimony of the defendant. Yet the trial court did not change its ruling. It allowed the Government to impeach Mr. Lucas, the sole defense witness, through his prior convictions.

Second, the trial court ruled that both pleas of guilty "go to the question of the honesty or dishonesty of the defendant," and are "permissible" under Luck. Here, too, the trial court did not conduct the sort of inquiry required by Luck. The issue is not only whether the crimes committed are "permissible", but whether they should be "permitted". This latter question requires examining the nature of the crimes, the manner of conviction (whether

by guilty plea or trial), the similarity of prior crimes to the crime charged, the age of the defendant, the length of his record, the nature of the defense (whether credibility is a principal issue and whether the defendant has other witnesses) and the possible prejudice which may result from impeachment use of the prior convictions. This was not the inquiry conducted below. Indeed, we have shown that the nature of a UUV conviction is not the sort which permits introduction of that crime at trial.

Since the trial court abused its discretion in allowing the Government to impeach Mr. Lucas through introduction to his prior convictions, reversal is required.

IV. Appellant's conviction of second degree burglary and grand larceny was not consistent with the evidence which showed those crimes were committed by a person having keys to the premises and the jury found appellant not guilty of the theft of those keys.

With regard to Point IV, appellant desires the Court to read the following pages of the reporter's transcript of the trial, TR 17-18, 43-44, 69-70, 111-114, 166-167.

In a civil action, a compromise reached by the jury on the issue of liability is illegal, requires reversal of the judgment, and the grant of a new trial. National Fire Ins. Co. of Hartford v. Great Lakes Warehouse Corp., 261 F.2d 35 (7th Cir. 1958); Schuerholz v. Roach, 58 F.2d 32, 34 (4th Cir.), cert. denied, 287 U.S. 623 (1932); 6A Moore, Federal Practice, Para. 59.08[4] and cases there cited. In a criminal case, where the consequences of a compromise verdict are not the loss of funds but commitment to prison, the rule against compromise verdicts should be even more strictly enforced.

That the jury below reached an illegal compromise verdict in convicting Mr. Lucas on Counts 3 and 4, while absolving him of guilt on Counts 1 and 2 we think is clear, for that verdict is inconsistent with the evidence adduced and thus requires reversal of his conviction, United States v. Daigle, 149 F. Supp. 409, 413 (D.D.C.), aff'd, 101 U.S. App. D.C. 286, 248 F.2d 608 (1957), cert. denied, 355 U.S. 913 (1958).

The evidence proved beyond doubt that the burglary of the Burger Chef was an inside job. There was no sign of breaking or forcible entry. The burglar had obtained access to the restaurant by a set of

keys, four of which—those of Messrs. Scott, Redman, Ramsey and Charuhas—were in existence in those early morning hours (TR 43-44, 69-70, 111-114).

There was absolutely no evidence that Mr. Lucas had a set of keys to the Burger Chef prior to the morning of October 11th. So too, there was absolutely no evidence that Mr. Scott had given his keys to Mr. Lucas. The only evidence adduced with regard to Mr. Scott's keys was conflicting. His testimony was that Mr. Lucas had grabbed them from him at the point of a razor (TR 17-18). By judgment of acquittal on Counts 1 and 2, the jury necessarily concluded that it reasonably doubted that story. Mr. Lucas' testimony was that he never took the keys from Mr. Scott (TR 166-167). Again, by judgment of acquittal on Counts 1 and 2, the jury seemingly concluded that that version of the facts was accurate. No other version was in evidence.

There is thus an irreconcilable conflict in the acquittal of Mr. Lucas on the charges of assaulting Mr. Scott with a dangerous weapon and taking the keys to the Burger Chef, with the guilty verdict of burgling that restaurant. Without the keys he could not be the burglar. The only evidence of his obtaining those keys was found unreliable by the jury. The jury is not at liberty to invent evidence. The conviction on Counts 3 and 4 is thus inconsistent with the evidence and must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed.

Respectfully submitted,

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(Appointed by This Court)

August 29, 1969

ADDENDUM

The Sixth Amendment to the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

14 D.C. Code §305 (1961) reads in pertinent part as follows:

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters. * * *

Rule 5 of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

* * * *

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination.

* * * *

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf.

* * * *

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed to Thomas A. Flannery, Esquire, United States Attorney, and to John A. Terry, Esquire, Assistant United States Attorney, United States Court House, Constitution Avenue and John Marshall Place, Washington, D.C., 20001, this 29th day of August, 1969.

/s/ Stephen F. Elperin
Stephen F. Elperin